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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO MARTINEZ,

Defendant and Appellant.

B268636

(Los Angeles County
Super. Ct. No. LA075140)

APPEAL from a judgment of the Superior Court of Los Angeles County. Martin Larry Hersocvitz, Judge. Affirmed.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Mario Martinez guilty of murdering his sister, Raquel, with findings that the murder was premeditated, and that Martinez personally used a deadly weapon during its commission. (Pen. Code, §§ 187, subd. (a); 12022, subd. (b)(1).)¹ On a post-verdict motion, the trial court reduced Martinez's conviction to second degree murder pursuant to *People v. Dillon* (1983) 34 Cal.3d 441. The court sentenced Martinez to an aggregate term of 16 years to life. Martinez contends the prosecutor committed various acts of prejudicial misconduct. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Martinez lived at home with his father, mother, sister Elisa, and Elisa's child. Martinez and his other sister, Raquel, had a contentious history. In February 2013, Raquel cut Martinez with a knife, slicing his hand. Martinez went to jail as a result of the incident, and Raquel secured a restraining order against Martinez. After she filed the restraining order, Raquel began staying overnight at other houses but also still slept at the family home on occasion.

On September 2, 2013, Raquel came to the family home around lunchtime to see her mother. Raquel grabbed a plate of food, ate it, and then left. As she was leaving, Raquel asked her mother if she needed anything, and her mother said she wanted to pick up some milk when she went to the store in the afternoon. Raquel told her mother that she would bring her the milk and returned to the house later in the afternoon to deliver it. When Raquel arrived, she stayed by the door and handed her mother the milk through the door. Her mother invited her inside, but

¹ All further undesignated section references are to the Penal Code.

Raquel “didn’t want to come in” and stood outside, hanging on the door frame with her arms. Throughout the entire interaction, Raquel never entered the house.

Martinez had been playing a video game in his room when he heard Raquel arrive the first time. Upon hearing Raquel’s voice, Martinez “kind of got angry” and walked to the door. He opened the door, caught a glimpse of Raquel, and then closed the door. Martinez began to reach for a knife and began thinking to himself, and saying, “No, I don’t know. I should—I shouldn’t do it. . . . I don’t know. Maybe I should.” He eventually “brushed it off,” saying, “Oh, well, this knife wouldn’t work anyway.” However, he opened the door and upon seeing Raquel, “really felt like doing it.” Martinez stated that he was considering running after Raquel after she walked out the front door, but put the knife on top of the television and broke the bathroom door instead.

When Raquel returned to deliver the milk to her mother, Martinez began washing a bigger knife in the kitchen. He claimed that he “thought it would be worse with a dirty knife” because it could give an “infection or something.” Martinez “just kept getting into [his] head of certain things that happened,” including the earlier assault, and that as a result he began “losing it.” Martinez “could have really just let it go, but something in [his] head didn’t want to let it go.” After Martinez washed the knife, he tried to conceal it because “[he] really didn’t want to do it in front of [his] mom or the little kid.”

Martinez came out of the kitchen area and stood in the middle of the living room. His mother noticed that Martinez was holding something close to his side, but she couldn’t make out what it was initially. However, as she got closer to Martinez, she

saw that he was holding a knife. Martinez did not say anything to Raquel, and she did not say anything back to him. Martinez then ran towards Raquel, and their mother told Raquel to run. Martinez caught up to Raquel outside of the house, grabbed her by the hair to pull her back, and then stabbed her in the neck with the knife. Their mother ran toward Martinez and grabbed him to try and stop him from stabbing Raquel. Martinez's mother positioned herself between Raquel and Martinez, but Martinez reached around his mother and continued stabbing Raquel. She eventually ripped his shirt off of him and grabbed his arm, but Martinez switched the knife to his other hand and continued stabbing Raquel.

Martinez's father woke up when he heard his wife screaming and came running outside. He pushed Martinez off Martinez's mother and Raquel when he saw that Martinez had a knife in his hand. He asked Martinez for the knife, and Martinez "calmly" gave him the knife. He told Martinez to "get the fuck out of here" and Martinez ran away from the scene. A neighbor and Martinez's father used towels to clean up the blood from Raquel and stop the bleeding until an ambulance arrived.

Los Angeles Police Department Detectives Townsend and Castro interviewed Martinez at the police station. When Detective Townsend asked Martinez whether the incident bothered him, he answered, "I don't know. She's not dead." When Detective Townsend asked if Martinez cared, he replied in kind, "Well, at least she's not dead." Further, Martinez stated: "But I tried, you know, so I could at least get death row" and "after I started stabbing, that's what went through my head: That it's just better off if she died, if—so I could get death row." When the detectives told Martinez that his sister died from her

injuries, he dismissed the statement as “bullshit” and said that he didn’t think she died.

The People filed an information charging Martinez with murder (§ 187) with an allegation that he committed the offense using a deadly weapon (§ 12022). Before trial, defense counsel raised the issue of Martinez’s competency to stand trial. After a hearing, the court ruled that Martinez was competent to understand the nature of his charges and assist in the preparation of his defense.

The jury found Martinez guilty of first degree murder and found true the deadly weapon enhancement. Martinez moved to have his conviction reduced to voluntary manslaughter; the court reduced the conviction to second degree murder. The court sentenced Martinez to an aggregate term of 16 years to life and ordered him to pay a variety of fines and fees. Martinez timely appealed.

DISCUSSION

I. No Prosecutorial Misconduct or Ineffective Assistance of Counsel

Martinez argues his murder conviction must be reversed based on two instances of prosecutorial misconduct. We disagree.

A. Forfeiture

Preliminarily, we find that Martinez has forfeited his claims of prosecutorial misconduct. As a general rule, a defendant “*cannot* complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion he made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.” (*People v. Benson* (1990) 52 Cal.3d 754, 794 (*Benson*), italics added.) For example, in *People v. Nguyen* (1995) 40 Cal.App.4th 28 (*Nguyen*), the Court

of Appeal, despite the potentially prejudicial nature of the prosecutor's statements, found that forfeiture principles applied where the record showed the defendant's counsel did not object to a prosecutor's alleged wrongful statements at trial. (*Id.* at p. 37.) Here, defense counsel did not object to either instance of misconduct with which he now takes issue. As a result, the claims are forfeited.

Even assuming the issues were not forfeited, we nonetheless find the allegations of prosecutorial misconduct baseless when examined on the merits.

B. General Principles of Prosecutorial Misconduct

"Prosecutorial misconduct implies the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Strickland* (1974) 11 Cal.3d 946, 955.) When presented with a claim of prosecutorial misconduct, a reviewing court examines the allegedly prejudicial statements by a prosecutor "[i]n the context of the whole argument and the [jury] instructions" to determine whether "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.'" (*People v. Centeno* (2014) 60 Cal.4th 659, 667 (*Centeno*).)

Courts have regularly supported the proposition that "a prosecutor is given wide latitude during argument" and have allowed commentary that is "vigorous as long as it amounts to fair comment on the evidence." (*People v. Williams* (1997) 16 Cal.4th 153, 221 (*Williams*); see also *Benson, supra*, 52 Cal.3d at p. 794 [rejecting prejudice contention when prosecutor stated "[q]uite frankly, if this crime doesn't deserve the death penalty, we shouldn't have one"]; *Williams*, at pp. 220-222 [permitting

prosecutor's epithet describing defendant and others as a " 'pack of laughing hyenas' ").)

However, courts have admonished prosecutors for improper explanations of the reasonable doubt standard. (See, e.g., *Centeno, supra*, 60 Cal.4th at pp. 665-666, 669-670 [holding that a prosecutor trivialized the reasonable doubt standard by asking to jurors identify "California" on a map even though inaccurate and incomplete statements were given about its location]; *People v. Otero* (2012) 210 Cal.App.4th 865, 872-873; *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1266-1267 (*Katzenberger*) [finding that using a diagram with pieces missing from a picture of the Statue of Liberty to illustrate the reasonable doubt standard improperly "leaves the distinct impression that the reasonable doubt standard may be met by a few pieces of evidence"].)

II. Prosecutor Did Not Make Improper Comments About the Standard of Proof

Martinez first takes issue with statements made by the prosecutor during closing argument. Here is the factual framework. In opening argument, the prosecutor acknowledged to the jury that, "[I]t's my burden—it's 100-percent my burden to prove beyond a reasonable doubt that a crime was committed and what that crime was." In response, defense counsel told the jury that the prosecutor's burden is "so high" in a murder trial because "we can't make mistakes here." Defense counsel then expounded on the reasonable doubt standard as follows:

"I do have to talk a little bit about reasonable doubt. We've all heard it. We learn about it in school. We hear it in T.V. shows . . . Essentially, what it says is before you can find [Martinez] guilty

of anything, you have to be able to say you have an abiding conviction that it's true.

“One of the best ways, I think, to think about and look at reasonable doubt is it's the highest standard we have in the law. That is reasonable doubt.”

Defense counsel then explained the difference between the reasonable doubt standard and other standards such as “probable cause” and “clear and convincing evidence.” In the course of this argument, defense counsel told the jurors that they should deliver a not guilty verdict unless they would have an “abiding conviction” years after their decision.

On rebuttal, the prosecutor offered these closing statements to the jury:

“Don't be scared into not finding a guilty verdict. *It happens every day.* I'm not afraid of reasonable doubt. Please do not be afraid of reasonable doubt. *People are convicted every day in this country. . . .*

“Would it be justice for Raquel if we were to say as a society that if you have a mental illness and there's no evidence whatsoever that that mental illness affected you when you committed your crime, you're not going to be guilty? Is that justice for Raquel? Is that how we, as a society, are going to operate? . . .

“It would not be justice for Raquel if the defendant was found anything other than guilty of first degree murder.” (Italics added.)

Martinez relies on *Nguyen* to assert the prosecutor's statement that "people are convicted every day in this country" falls into the impermissible standard, and that this misstatement "infected the entire trial with unfairness." We disagree.

In *Nguyen*, the prosecutor instructed the jury about the reasonable doubt standard with these statements: "The standard is reasonable doubt. That is the standard in every single criminal case. And the jails and prisons are full, ladies and gentlemen. [¶] It's a very reachable standard that you use every day in your lives when you make important decisions, decisions about whether you want to get married, decisions that take your life at stake when you change lanes as you're driving. If you have reasonable doubt that you're going to get in a car accident, you don't change lanes.'" (*Nguyen, supra*, 40 Cal.App.4th at p. 35.) The court criticized the prosecutor's statements, arguing that his allusions to changing lanes and marriage "trivialize[d] the reasonable doubt standard." (*Id.* at p. 36.) The court found that even though the prosecutor acknowledged that the reasonable doubt standard was "very high" and instructed the jury to read the jury instructions, these actions were not enough to outweigh his argument's impropriety. (*Ibid.*)

We reject Martinez's contention that the *Nguyen* court necessarily found that the prosecutor's comments about "the jails and prisons are full" trivialized the reasonable doubt standard. The *Nguyen* court did not refer to this statement anywhere in its holding on "trivializing" the reasonable doubt standard. (*Nguyen, supra*, 40 Cal.App.4th at pp. 35-37.) Instead, the *Nguyen* court only focused on the prosecutor's comparison of the reasonable doubt standard to "every day" events such as changing lanes and

getting married. (*Id.* at p. 36.) In this case, we find the prosecutor’s language regarding reasonable doubt does not rise to a level of which we would “strongly disapprove.” (*Ibid.*) We do not find the prosecutor’s statement that convictions occur “every day” constituted an “‘attempt to absolve the prosecution from its . . . obligation to overcome reasonable doubt on all elements’” (*Centeno, supra*, 60 Cal.4th at p. 666), nor did it amount to a “‘deceptive or reprehensible method[] to persuade the jury.’” (*People v. Parson* (2008) 44 Cal.4th 332, 359.) Indeed, the prosecutor explicitly acknowledged that proving the charged crime was “100-percent my burden to prove beyond a reasonable doubt.” Furthermore, unlike in *Nguyen*, where the prosecutor’s explanation of the reasonable doubt standard incorrectly informed the jurors that they make decisions using this standard in “every day” life, the prosecutor in this case only instructed the jury on its relation to criminal cases.

Assuming the comments were inappropriate, we find they were not prejudicial. In this case, the court instructed the jury that the defendant is presumed innocent and that the prosecutor must prove Martinez’s guilt beyond a reasonable doubt. (CALCRIM No. 220.) The court properly instructed that “[p]roof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true.” The court also admonished the jury that if anyone “believe[s] that the attorneys’ comments on the law conflict with [the] instructions, [he or she] must follow [the court’s] instructions.” We presume that the jury followed the court’s instructions. (*Katzenberger, supra*, 178 Cal.App.4th at p. 1269; *Nguyen, supra*, 40 Cal.App.4th at pp. 36-37.) When, as here, a trial court correctly instructed on the law, a reviewing court may attribute the jury’s verdict to the jury

following its directions rather than any attorney's misdirection. (*People v. Hughey* (1987) 194 Cal.App.3d 1383, 1396, fn. 8; *People v. Young* (2005) 34 Cal.4th 1149, 1197.) For these reasons, Martinez's argument fails.²

III. Prosecutor Did Not Make Comments Which Inflamed the Jury's Passion

Martinez also contends there was prosecutorial misconduct during the prosecutor's statements to the jury during rebuttal. Martinez takes exception to the following comments the prosecutor made while concluding his remarks to the jury:

"What happened here is . . . terrible. [¶] Would it be justice for Raquel if we were to say as a society that if you have a mental illness and there's no evidence whatsoever that that mental illness affected you when you committed your crime, you're not going to be guilty? . . . Is that how we, as a society, are going to operate?

"If Raquel brought milk over to her mother every single day in this exact same scenario . . . would that in some way be provocation for murder?

² For the same reasons, we find no claim for ineffective assistance of counsel. A party's claim for relief based on ineffective assistance of counsel has two components. First, the party must show that counsel's performance was deficient. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Pope* (1979) 23 Cal.3d 412, 423-425.) Second, the party must also establish prejudice before he can obtain relief on an ineffective assistance claim. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217.) As we find there was no prejudicial prosecutorial misconduct, counsel was not at fault for failing to object to the statements.

Of course not. . . . Justice demands that the defendant be responsible; not excuses, excuses.

“He should not get a pass. He murdered his sister with the intent to kill her. . . .

“It would not be justice for Raquel if the defendant was found anything other than guilty of first degree murder.”

Martinez contends these statements “improperly appealed to the passions and sympathy of the jury.” He argues the prosecutor’s comments took the jury’s focus off the evidence of his mental illness. Martinez claims the prosecutor’s statements were in line with an overall theme that “justice demands that the defendant be [held] responsible” and that this improperly encouraged the individual jurors to “act as a personal partisan advocate for Raquel” rather than “properly rendering an objective, unbiased verdict based on the evidence presented and the law stated in the jury instructions.” We are not persuaded.

As stated above, a prosecutor has “wide latitude” in presenting arguments to a jury. (*Williams, supra*, 16 Cal.4th at p. 221.) The published cases teach that a prosecutor is allowed to appeal to a community’s sense of justice and fairness, even by invoking “brief references to retribution or community vengeance” as long as “such arguments do not form the principal basis for [the prosecutor’s argument].” (*People v. Ghent* (1987) 43 Cal.3d 739, 771; see also *Benson, supra*, 52 Cal.3d at p. 794 [rejecting a claim of prejudice when prosecutor stated “[q]uite frankly, if this crime doesn’t deserve the death penalty, we shouldn’t have one”].)

In *People v. Wash* (1993) 6 Cal.4th 215, 261-262, the court examined whether a prosecutor's comments that implored the jury " 'to make a statement,' to do 'the right thing,' and to restore 'confidence' in the criminal justice system by returning a verdict of death" could be considered prejudicial to the defendant. The court found these statements "were not particularly inflammatory." (*Id.* at p. 262.) The court also reasoned that the remarks did not "constitute the principal basis of his argument." (*Ibid.*) Therefore, the court found these comments were not prejudicial to the defendant. (*Ibid.*; see also *People v. Adanandus* (2007) 157 Cal.App.4th 496, 511-513 [holding that prosecutor's pleas to jury to "restore order" and "restore justice to that street" in murder case did not constitute prejudicial misconduct]; *People v. Lang* (1989) 49 Cal.3d 991, 1041 [prosecutor did not commit misconduct by stating, " 'if you want to have a voice in your community and an effect upon the law in the community, this is your opportunity' "].) We find the same can be said of the prosecutor's comments in this case; they were not inflammatory and did not constitute the majority of the prosecutor's argument.

Martinez relies on *People v. Medina* (1995) 11 Cal.4th 694, to support his contention. In that case, the prosecutor implored "the jury to 'do the right thing, to do justice, not for our society, necessarily or exclusively, but for [the victim], an 18 year-old boy who was just working at a gas station one night.'" (*Id.* at pp. 759-760.) Martinez argues the *Medina* court "implicitly held that this argument was an improper appeal to the jurors' passion." Martinez is incorrect. The *Medina* court made no finding the statements were inappropriate. Instead, it found only that they were not prejudicial. (*Ibid.*)

The prosecutor's comments did not, as Martinez contends, improperly tell the jury to disregard his mental health issues as they related to the issue of his mental state. The prosecutor did not argue that Martinez's mental illness could not reduce the nature of the charge. Instead, she argued that, when "*there's no evidence whatsoever that that mental illness affected you when you committed your crime,*" such a person should not be acquitted.

Nor can Martinez demonstrate prejudice based on this portion of the prosecutor's argument. Again, the argument was brief, and was made in response to his counsel's arguments. Given the appropriate instructions on reasonable doubt and the admonition to the jury that any statements made by the prosecutor that conflict with the law should be disregarded, we discern no prejudice. Martinez's lengthy arguments that the prosecutor's brief comment, made to rebut his counsel's arguments, likely caused the jury to convict him of murder rather than some form of manslaughter are specious.

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.